A

Maryam Shabani Ali Heidar v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–243–10 OF 2013
AZIAH ALI, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
11 FEBRUARY 2015

C

Evidence — Conflicting testimony — Conflicting testimonies from prosecution and defence witnesses — Accused inter alia said she was not wearing waist girdle containing dangerous drugs at material time and also denied she begged police not to search her — Whether within domain of trial judge after seeing and hearing witnesses to prefer prosecution's evidence over accused's — Whether police officers who stopped and searched accused had no motive to lie and frame accused — Whether even without evidence of accused's conduct at time of body search she could not explain reason for having dangerous drugs in her possession — Whether prosecution had proved mens rea possession and charge of trafficking

D

E

The appellant was convicted and sentenced to death by the High Court for trafficking in 755.8g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). According to the prosecution's evidence, a policeman, SP2, and a policewoman, SP4, were on routine duty at the arrival hall of the Kuala Lumpur International Airport ('KLIA') when they stopped the appellant and SP4 did a cursory body search on her. As SP4 felt a bulge at the appellant's waist, she told the appellant to follow her to a room for a full body search. The appellant reluctantly followed and when they arrived at the room the appellant allegedly knelt and pleaded with SP4 not to search her. SP4 found the appellant was wearing a girdle containing five plastic packets of the methamphetamine. In her defence at the trial, the appellant contended that it was not SP4 but someone else who had examined her. The appellant also denied she was wearing the girdle and said it was recovered from her bag which she had left unattended in the washroom earlier. She also challenged the prosecution's version on her conduct. The sole ground raised by the appellant in the instant appeal against conviction and sentence was that the trial judge failed to sufficiently consider her defence and erred in ruling that it was a mere denial and that no evidence was led to rebut the presumption of trafficking invoked against the appellant under the DDA.

F

G

H

I

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Although the appellant's defence could not be said to be a mere denial as she had given her explanation on how the girdle was said to be in her bag, looking at the evidence in totality, the prosecution had proved its case

beyond reasonable doubt and the defence had failed to raise a doubt on the prosecution's case. The prosecution and the defence gave two divergent versions of the events. The trial judge after seeing and hearing the witnesses chose to accept the prosecution's version over the appellant's and he found that the girdle was worn by the appellant at the material time. There was no cogent reason to disturb that finding. There was thus overwhelming evidence to show the appellant had carried the drugs into KLIA and had concealed the drugs in the girdle. The prosecution had proved mens rea possession and trafficking under s 2 of the DDA (see paras 14–15 & 19–20).

(2) The court agreed with the trial judge's statement that there was no reason for the prosecution's witnesses to lie. In particular, SP4 who was on routine duty at the arrival hall of KLIA had no motive to testify against the appellant, an old lady. There was no reason for SP4 to state she conducted the body search on the appellant and found her to be wearing a girdle and that the appellant had pleaded not to be examined if that was not the case (see para 16).

(3) Even if there was no evidence from SP2 on the appellant's conduct to show her guilty mind, the more critical evidence was the appellant's conduct when she entered the examination room with SP4. SP4 said the appellant pleaded with her, knelt on the floor and kissed her hand and said something in the Iranian language which SP4 did not understand. But even without the evidence of conduct, the fact remained that the appellant was caught with the drugs on her person concealed in a girdle worn by her (see paras 18–19).

[Bahasa Malaysia summary

Perayu disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar methamphetamine seberat 755.8g, kesalahan yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Mengikut keterangan pihak pendakwaan, seorang polis lelaki, SP2, dan seorang polis wanita, SP4, bertugas di balai ketibaan Lapangan Terbang Antarabangsa ('KLIA') apabila mereka menahan perayu dan SP4 menjalankan carian badan ke atasnya. Memandangkan SP4 merasai bonjol di pinggang perayu, dia memberitahu perayu untuk mengikuti dia ke bilik untuk carian badan penuh. Perayu dengan berat hati mengikuti dan apabila mereka tiba di bilik perayu didakwa berlutut dan merayu kepada SP4 untuk tidak membuat carian ke atasnya. SP4 mendapati perayu memakai bengkung yang mengandungi lima paket plastik methamphetamine. Dalam pembelaannya semasa perbicaraan, perayu berhujah ia bukan SP4 tetapi seorang yang lain memeriksanya. Perayu juga menafikan dia memakai bengkung dan menyatakan ia didapati daripada begnya yang mana dia tinggal tanpa jagaan di bilik air sebelumnya. Dia juga mencabar versi pihak pendakwaan atas tingkah lakunya. Satu-satunya alasan yang dibangkitkan oleh perayu dalam rayuan ini terhadap sabitan dan

hukuman adalah bahawa hakim perbicaraan gagal untuk mempertimbangkan pembelaannya secara mencukupi dan tersilap dalam memerintahkan bahawa ia adalah penafian semata-mata dan tiada keterangan yang dikemukakan untuk mematahkan anggapan pengedaran yang dibangkitkan terhadap perayu di bawah ADB.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Walaupun pembelaan perayu tidak dapat dikatakan hanya penafian semata-mata kerana dia telah memberikan penjelasan bagaimana bengkung dikatakan berada dalam begnya, melihat kepada keterangan dalam keseluruhannya, pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah dan pembelaan telah gagal untuk membangkitkan kesangsian ke atas kes pihak pendakwaan. Pihak pendakwaan dan pembelaan memberikan dua versi berbeza kejadian tersebut. Hakim perbicaraan selepas melihat dan mendengar saksi-saksi memilih untuk menerima versi pihak pendakwaan ke atas perayu dan beliau mendapati bahawa bengkung dipakai oleh perayu pada masa material. Tidak terdapat alasan yang jelas untuk menganggu dapatan tersebut. Dengan itu terdapat keterangan kukuh untuk menunjukkan perayu telah membawa dadah masuk ke KLIA dan telah menyembunyikan dadah dalam bengkung. Pihak pendakwaan telah membuktikan milikan mens rea dan pengedaran di bawah s 2 ADB (lihat perenggan 14–15 & 19–20).

(2) Mahkamah bersetuju dengan pernyataan hakim perbicaraan bahawa tidak terdapat alasan untuk saksi-saksi pihak pendakwaan untuk berbohong. Terutamanya, SP4 yang bertugas di balai ketibaan KLIA tiada motif untuk memberi keterangan terhadap perayu, seorang perempuan tua. Tidak terdapat alasan untuk SP4 untuk menyatakan dia menjalankan carian badan ke atas perayu dan mendapatinya memakai bengkung dan bahawa perayu telah merayu untuk tidak diperiksa jika ia bukan kesnya (lihat perenggan 16).

(3) Walaupun tidak terdapat keterangan daripada SP2 atas tingkah laku perayu untuk menunjukkan mindanya yang bersalah, keterangan yang lebih kritikal adalah tingkah laku perayu semasa dia memasuki bilik pemeriksaan dengan SP4. SP4 menyatakan perayu memplid dengannya berlutut atas lantai dan mencium tangan dan menyatakan sesuatu dalam bahasa Iran yang mana tidak difahami SP4. Tetapi walaupun tanpa keterangan tingkah laku, fakta kekal bahawa perayu ditangkap dengan dadah ke atasnya yang disembunyikan dalam bengkung yang dipakai olehnya (lihat perenggan 18–19).]

Notes

For cases on conflicting testimonies from prosecution and defence witnesses, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 1167–1168.

Cases referred to

Dato Mokhtar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232; [1983] CLJ (Rep) 101, FC (refd)
Davendar Singh a/l Sher Singh v Pendakwa Raya [2012] MLJU 321; [2012] 3 MLRA 114, CA (refd)
Er Ah Kiat v PP [1965] 2 MLJ 238, FC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Mohamed Ali [1962] 1 MLJ 257 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Pendakwa Raya lwn Muhd Zulkifli bin Abd Ghani and Anor [2010] MLJU 1744; [2011] 2 CLJ 772, CA (refd)
Selvam a/l Arjunan v Public Prosecutor [2012] 4 MLJ 755, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39A(2), 39B(2)

Appeal from: Criminal Trial No 45A-292–10 of 2011 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the apppellant.
Mohd Fairuz bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was charged at the High Court Shah Alam for trafficking in 755.8g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act').

[2] The prosecution's case rests on the testimony of C/Insp Mohideen bin Hasim ('SP2') and Kpl W Suhaini ('SP4'), who were on a routine duty at the arrival hall of KLIA. It was the evidence of SP4 that she felt a bulge in the waist area of the appellant when a cursory body search was conducted on the appellant. SP4 informed SP2 of her suspicions. SP2 directed SP4 to conduct a full body search on the appellant in an examination room. According to SP4 (who was the only female officer on duty on the material day), the appellant was reluctant to follow her to the examination room and while in the examination room, the appellant knelt and pleaded with SP4 not to search her. Upon the body search by SP4, she found a girdle (exh P20) worn by the appellant. SP4 called SP2 who was outside the room. SP2 entered the room

and he saw the girdle at the waist of the appellant.

[3] SP4 examined the girdle and she noticed five sewn areas with protruding features. SP4 opened the stitches of the protruding areas from where she recovered five plastic packets containing substances. The chemist (SP3) later confirmed that four out of the five plastic packets contained methamphetamine.

[4] At the end of the prosecution's case the learned trial judge stated that (*rekod rayuan Jld* 4: pp 311–313):

> In determining whether there is sufficient evidence it is also incumbent upon the court to determine the veracity of the evidence given by the prosecution witnesses which in turn is determined by the credibility of the witnesses.
>
> I found the prosecution witnesses to be credible and there were no facts to suggest anyone was telling lies. This was true especially of the 2 material prosecution witnesses SP2 and SP4 who were involved directly with the accused leading to the arrest. Both withstood intense cross examination and suggestions by the defence counsel challenging their version of the events. The defence particularly challenged the fact that the girdle was not worn by the appellant and instead was found in the bag.
>
> Both SP2 and SP4 were steadfast in their testimony that the girdle was worn by the accused. I further believed the testimony of SP4 about the reaction of the accused in pleading not to be checked.
>
> ...
>
> Having believed the prosecution witnesses what came forth was the fact that the girdle containing the drugs was worn by the accused on her waist and she had attempted to evade being examined.
>
> These facts to me are a clear indication that the accused was in possession of the girdle containing the drugs being fully aware of the contents. Her behaviour at the point of incident was the single most important indicator of her guilty mind.

[5] The learned trial judge found that the prosecution had made out a prima facie case. The appellant was called upon to enter her defence.

[6] The appellant gave evidence under oath. Her version was diametrically opposite the prosecution's version. The appellant denied that she was examined by SP4. According to the appellant, somebody else with a different complexion and attire had examined her. The appellant further denied that the girdle was found on her. Her version was that the girdle was recovered from her bag which she had left unattended in the washroom. She had also challenged the prosecution's version on her conduct.

[7] The learned trial judge's finding on the defence was as follows (*rekod rayuan Jld 4*: pp 316–317):

> In evaluating the defence I regarded it as nothing more than a mere denial and an attempt by the accused to throw aspersions on others, right from the police until to unknown persons but not giving any reasons why anyone would one to frame her.
>
> The accused further wanted to impress the court that she was a wealthy tourist who had come to Malaysia barely 2 months before to do nothing more than sightseeing and shopping. The trips were apparently funded by her children yet I saw none of her children attending court although their mother faced the death sentence.
>
> I deduced from her demeanour and evidence that the evidence of the accused were total lies and did not raise even a fanciful doubt let alone a reasonable doubth in the case of the prosecution. In this case I chose to believe the testimony of the prosecution witnesses who were more credible and honest.
>
> There was absolutely no reason for the prosecution witnesses to lie against an old lady like the accused. It was not as if she was a member of a drug racket who needed to be hunted down and maybe a reason for the prosecution witnesses to lie against her.
>
> Finally I noticed that in her attempt to deflect possession of the drugs the accused led no evidence to rebut the presumption of trafficking which she is legally bound to do on a balance of probabilities.

[8] The appellant was thus convicted and sentenced to death.

THE APPEAL

[9] Before us, learned counsel for the appellant canvassed only one ground of appeal, namely that the learned trial judge erred in law when His Lordship failed to adequately and sufficiently appreciate the defence case.

[10] In particular, the complaint of learned counsel was that the learned trial judge misdirected himself in the following areas:

(a) in describing the defence as a mere denial;

(b) in describing the defence as a total lie;

(c) in requiring the children of the appellant to be present in court; and

(d) in stating that the appellant led no evidence to rebut the presumption of trafficking.

[11] It was submitted by learned counsel that the learned trial judge's finding that the appellant led no evidence to rebut the presumption of trafficking amounted to no consideration at all of the evidence given by the appellant on oath, which evidence was tested by the prosecution. Further, it was submitted

that in requiring the children of the appellant to be present in court before the appellant could be believed, the learned trial judge had erred in his approach as it was akin to requiring the defence to produce credible evidence or to call witnesses before the defence could be considered. The correct approach, argued learned counsel, was for the learned trial judge to ask whether the appellant's version that her trip was sponsored by her children was reasonable and could be believed. In support of the above argument, learned counsel relied on *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; *Davendar Singh a/l Sher Singh v Pendakwa Raya* [2012] MLJU 321; [2012] 3 MLRA 114.

[12] Learned counsel had also submitted on the learned trial judge's failure to allude to the issues raised at the end of the defence case which included the contradictions between the evidence of SP2 and SP4 on the alleged conduct of the appellant in attempting to evade the body search. Learned counsel contended that the omission by the learned trial judge had occasioned a failure of justice. Finally learned counsel submitted that the conviction of the appellant for trafficking under s 39B(2) ought to be set aside and substituted for possession under s 39A(2) of the Act.

OUR DECISION

[13] The ground of appeal centred on the approach taken by the learned trial judge in evaluating the defence, which learned counsel contended was wrong in law, in particular in His Lordship's treatment of the defence as a mere denial and total lies and in requiring the presence of the appellant's children in court.

[14] While we agreed with learned counsel that the defence of the appellant could not be said to be a mere denial as she had given her explanation on how the girdle was said to be in her bag and that the approach of the learned trial judge in requiring the children of the appellant to be present in court was an erroneous approach, looking at the evidence in totality, we found that the prosecution had proved its case against the appellant beyond reasonable doubt and that the defence had failed to raise a doubt on the prosecution's case.

[15] The prosecution and the defence had given two divergent versions of the events that took place leading to the discovery of the drugs and the arrest of the appellant at the KLIA. In this regard, the learned trial judge who had heard and seen the witnesses chose to accept the evidence of the prosecution witnesses over the evidence of the appellant. In accepting the evidence of the prosecution witnesses and in making a finding on the credibility of SP2 and SP4, His Lordship had referred to the case of *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257 wherein it was stated that:

> ... when a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. ... Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherently probability (*sic*) the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[16] It is trite that the credibility of witnesses is entirely a matter within the domain of the trial judge (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ (Rep) 101; *Pendakwa Raya lwn Muhd Zulkifli bin Abd Ghani and Anor* [2010] MLJU 1744; [2011] 2 CLJ 772; *Selvam a/l Arjunan v Public Prosecutor* [2012] 4 MLJ 755). The learned trial judge had stated that there was absolutely no reason for the prosecution witnesses to lie against the appellant, an old lady. We agreed with the learned trial judge. In particular, SP4 who was on a routine duty at the arrival hall of KLIA had no motive to testify against the appellant. There was no reason for SP4 to state that she had conducted the body search on the appellant; that she had found the girdle worn by the appellant and that the appellant had pleaded with her not to examine the appellant, if that was not the case (see *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15).

[17] Learned counsel had submitted that there were contradictions between the evidence of SP2 and SP4 on the conduct of the appellant. SP2 testified as follows (*rekod rayuan Jld* 1: p 37):

> DPP Baik. Tadi Tuan Mohideen kata Tuan nampak pemeriksaan badan oleh KPL Suhaini di kawasan pemeriksaan mesin pengimbas, mesin X-ray tadi, ya?
>
> MOHIDEEN Benar, Dato'.
>
> DPP Ada apa reaksi Tertuduh pada waktu diperiksa?
>
> MOHIDEEN Reaksi selamba sahaja, biasa sahaja.

[18] Even if we were to accept that there was no evidence from SP2 on the conduct of the appellant to show her guilty mind, the more critical evidence on the conduct of the appellant, in our view, would be the conduct of the appellant in the examination room. SP4 who was alone with the appellant when a full body search was done in the examination room gave the following evidence (*rekod rayuan Jld* 2: p 137):

> SUHAINI ... setelah tiba di dalam bilik tersebut, dia ada merayu dengan saya dan melutut di atas lantai serta mencium tangan saya. ... dan bercakap sesuatu di dalam Bahasa Iran. Tetapi saya tidak faham ....

[19] Even without the evidence on conduct, the fact remained that the appellant was caught with the drugs on her person, concealed in a girdle worn by her. We were mindful of the challenge made by the defence on the recovery of the girdle, but as discussed above, the learned trial judge had accepted the prosecution's version and had found that the girdle was worn by the appellant. We found no cogent reason to disturb the finding of the learned trial judge.

[20] There was thus overwhelming evidence to show that the appellant carried the dangerous drugs into KLIA and had concealed the drugs in the girdle. The prosecution, in our judgment, had proved mens rea possession and trafficking under s 2 of the Act.

[21] Based on all the above, we found the conviction of the appellant safe. We unanimously dismissed the appeal. The conviction and sentence of the High Court was affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar